STATE OF MICHIGAN

COURT OF APPEALS

AARON JACOB ERDMAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2014
v	No. 319702 Genesee Circuit Court Family Division
TRACI MARIE FORSTER, also known as TRACI MARIE VANCE, Defendant-Appellant.	LC No. 04-251924-DC

Before: CAVANAGH, P.J., and JANSEN and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right an opinion and order granting plaintiff's motion to modify custody, parenting time and support, and to change the domicile of the minor child. We affirm.

Defendant contends that the trial court merely paraphrased the findings and conclusions of the referee, and in doing so, failed to conduct an independent analysis of the best-interest factors. Further, defendant argues that the trial court improperly denied her motion for reconsideration under MCL 552.507. We disagree.

Pursuant to MCL 722.28, in child custody disputes, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." *Dailey v Kloenhamer*, 291 Mich App 660, 664; 811 NW2d 501 (2011), quoting MCL 722.28. Accordingly, the trial court's findings of fact are reviewed under the great weight of the evidence standard. *Fletcher v Fletcher*, 447 Mich 871, 878-879; 526 NW2d 889 (1994). Discretionary rulings, including the ultimate award of custody, are reviewed for an abuse of discretion. *Id.* at 879. In order for an abuse of discretion to occur, "the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passions or bias." *Shulick v Richards*, 273 Mich App 320, 324; 729 NW2d 533 (2006). Further, "clear legal error" occurs when the trial court chooses, interprets, or applies the law incorrectly. *Fletcher*, 447 Mich at 881. Statutory interpretation is a question of law that this Court considers de novo on appeal. *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004). This Court reviews a trial court's ruling on a motion for reconsideration for an abuse

of discretion. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). With respect to the motion for reconsideration, an abuse of discretion occurs when the decision results in an outcome that falls outside the range of principled outcomes. *Id.* at 605-606.

MCL 552.507 provides, in pertinent part:

> (5) A hearing is de novo despite the court's imposition of reasonable restrictions and conditions to conserve the resources of the parties and the court if the following conditions are met:
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> (a) The parties have been given a full opportunity to present and preserve important evidence at the referee hearing.
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> (b) For findings of fact to which the parties have objected, the parties are afforded a new opportunity to offer the same evidence to the court as was presented to the referee and to supplement that evidence with evidence that could not have been presented to the referee.
>
> (6) Subject to subsection (5), de novo hearings include, but are not limited to, the following:
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> (a) A new decision based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee.
>
> (b) A new decision based only on evidence presented at the time of the de novo hearing.
>
> *(c) A new decision based in part on the record of a referee hearing supplemented by evidence that was not introduced at a previous hearing.* [Emphasis added.]

After conducting a de novo hearing, the trial court considered each of the best-interest factors. The trial court did not merely paraphrase the referee's findings on the best-interest factors; instead, the court evaluated the factors in light of the testimony from both hearings. In fact, the trial court's evaluation of the best-interest factors differed from that of the referee's findings. The referee found that factors (a) and (f) favored both parties, factors (b), (c), (d), (e), (g), (h), (i), and (j) favored plaintiff, and factor (k) was not a factor to consider. Contrarily, the trial court found that factors (a), (f), (h), (j), and (k) favored neither party, but factors (b), (c), (d), (e), (g), and (i) favored plaintiff. Moreover, although similarities existed in the findings of the referee and trial court, the findings themselves differed under each best-interest factor. As evidenced by the differing findings and conclusions with respect to certain factors, the trial court made a separate and independent evaluation from that of the referee. Thus, defendant's contention is without factual merit. Furthermore, under MCL 552.507(6)(c), the trial court did not abuse its discretion in partially basing its findings on evidence from the referee hearing. Accordingly, defendant's contention is also without legal merit, and the trial court did not err in denying her reconsideration on this basis.

Defendant next argues that the trial court's findings concerning the best-interest factors failed to contemplate certain evidence, and are against the great weight of the evidence. We disagree.

As discussed above, the trial court's findings of fact are reviewed under the great weight of the evidence standard. *Fletcher*, 447 Mich at 878-879. Under the great weight standard, the trial court's determination should be affirmed unless the evidence clearly preponderates in the other direction. *Mitchell v Mitchell*, 296 Mich App 513, 519; 823 NW2d 153 (2012). In reviewing the findings, this Court should defer to the trial court's determination of credibility. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

"Before modifying or amending a custody order, the circuit court must determine whether the moving party has demonstrated either proper cause or a change of circumstances to warrant reconsideration of the custody decision." *Dailey*, 291 Mich App at 665, citing MCL 722.27(1)(c). The moving party carries the burden of proving by a preponderance of the evidence that a change of circumstances exists. *Dailey*, 291 Mich App at 665. Once a party meets the initial burden of showing a change in circumstances or proper cause, the next step is for the court to determine the applicable burden of proof for the custody hearing. *Id.* at 666-667. Where an established custodial environment exists with both parents, the trial court may not modify custody unless it finds clear and convincing evidence that modification is in the child's best interest. *Id.* at 667. Specifically, the trial court must review the statutory best-interest factors listed in MCL 722.23. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007).

Defendant only challenges the trial court's evaluation of the best-interest factors. The trial court "must expressly evaluate each best-interest factor and state its reasons for granting or denying the custody request on the record. *Dailey*, 291 Mich App at 667, citing MCL 722.26a. The best-interest factors listed in MCL 722.23 are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
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> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
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> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

Generally, the trial court must consider and explicitly state its findings and conclusions regarding each factor and the failure to do so is usually error requiring reversal. *Rittershaus*, 273 Mich App at 475. However, the trial court does not need to comment on every matter in evidence, or discuss any particular testimony in its findings and conclusions. *Sinicropi v Mazurek*, 273 Mich App 149, 180; 729 NW2d 256 (2006).

Factor (b) involves the "capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). The trial court found that factor (b) favored plaintiff because he can provide a stable environment, has an established job, and owns a home in Jacksonville. In contrast, the trial court noted that defendant has moved multiple times, and left the marital home to live with another man who was not her husband. Further, the trial court found that plaintiff testified that he takes the minor child to church and bought him a Bible, which defendant would not allow the minor child to have in her home. Defendant argues that the trial court placed too much emphasis on the fact that plaintiff provided the minor child with a Bible, and that defendant refused the child access to the Bible. Further, defendant argues that the trial court ignored the fact that plaintiff does not know the names of the minor child's teacher or the subjects he excels at in school. Also, defendant argues that the trial court misapplied this factor because it is irrelevant that plaintiff has a steady job, and evidence was not presented that she was living with another man.

Defendant fails to cite any legal authority in support of her assertion that the trial court misapplied factor (b) by taking into consideration that plaintiff has a steady job, and thus, this issue is waived. See *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007) ("When a party merely announces a position and provides no authority to support it, we consider the issue waived.") In any event, the trial court's finding that plaintiff has a steady job is not completely irrelevant in the determination of a party's capacity and disposition to give the child love, affection, and guidance. Additionally, although evidence was not presented that defendant was living with another man, the testimony revealed that her boyfriend did stay overnight occasionally. This dissimilarity does not render the trial court's

determination that factor (b) favored plaintiff against the great weight of the evidence. Therefore, defendant's contentions with respect to factor (b) fail.

The testimony presented at the referee hearing and de novo hearing revealed that defendant was actively involved in the minor child's school. Although plaintiff did not know the name of the minor child's teachers, he resided in Florida and defendant was uncooperative in relaying information concerning the minor child. Plaintiff looked into the school the minor child would potentially be transferring to and spoke with the principal. Plaintiff also read books with the minor child, and plays Scrabble to test his reading aptitude. Despite defendant's involvement in the minor child's education, evidence was presented that she hindered the minor child's desire to practice religion. Testimony was presented that the minor child attended church while visiting plaintiff in Florida over the summer, and participated in activities at the church. The minor child requested a Bible, which plaintiff provided. However, when the minor child returned home, defendant refused to allow the minor child to partake in religious activities. Accordingly, the evidence does not clearly preponderate against the trial court's finding that factor (b) favored plaintiff.

Factor (c) involves the "capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs," MCL 722.23(c). With respect to factor (c), this Court, in *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008), held:

> Factor c does not contemplate which party earns more money; it is intended to evaluate the parties' *capacity* and *disposition* to provide for the children's material and medical needs. Thus, this factor looks to the future, not to which party earned more money at the time of trial, or which party historically has been the family's main source of income.

Here, the trial court concluded that factor (c) favored plaintiff because he had an excellent job at CSX Transportation in Jacksonville, where he had resided since 2008. The trial court noted that defendant had just recently obtained employment with Hungry Howie's, working part-time, after not working since December 2012. The trial court also noted plaintiff testified that the minor child does not always have clothing and shoes that fit properly while in defendant's care. Defendant argues that the trial court placed undue weight on plaintiff's testimony that the minor child did not have properly fitting clothing and shoes, especially in light of the fact that plaintiff could not produce photographs evidencing this testimony after having confirmed that he had them in his possession. Additionally, defendant asserts that the trial court improperly took into account which party earns more money and has a better job.

Despite defendant's contention otherwise, the evidence presented at the hearings makes it clear that factor (c) favored plaintiff. Defendant only held a minimum wage part-time job from August 2012 to December 2012, and did not become employed again until two weeks before the de novo hearing in September of 2013. On the other hand, plaintiff has been employed full-time with the same company for 14 years, and makes over $100,000 a year. While defendant is correct in her assertion that factor (c) does not contemplate who earns more money, the evidence supports the finding that plaintiff has the capacity and disposition to provide for the minor

child's material and medical needs. As evidenced by plaintiff's continued employment with the same company for 14 years, and defendant's general inability to keep and maintain employment, as well as pay her own rent without the child support payments, defendant's contention is without merit. Although defendant also argues that the trial court placed too much emphasis on plaintiff's testimony concerning the clothing given plaintiff's inability to produce photographs supporting his testimony, this Court defers to the trial court for credibility determinations. *Shann*, 293 Mich App at 305. Evidence was presented that plaintiff purchased clothes for the minor child, and most of the clothing and shoes that defendant provided did not fit the child. Accordingly, the trial court's determination that factor (c) favored plaintiff is not against the great weight of the evidence.

Factor (d) involves the length of time the children have lived in a stable, satisfactory environment, and the desirability of maintaining continuity. MCL 722.23(d). The trial court found that factor (d) favored plaintiff for the reasons set forth in factors (b) and (c), and also because the referee noted that defendant left the minor child with her ex-husband, Jeff Vance, when she left the marital home, and the child stayed with him until leaving for Florida to visit plaintiff. As a result, the trial court found that the minor child's environment has been neither stable nor satisfactory. Defendant argues that the evidence presented contradicts these findings, particularly testimony that the minor child spends time at the former marital home with Vance only when defendant is at work, and the minor child currently lives in a stable environment in defendant's apartment.

The testimony reveals that defendant moved out of the marital home and into her boyfriend's mother's basement. Months later, in September 2012, she moved into an apartment. Evidence was presented that the minor child spends a significant amount of time at the home of defendant's ex-husband. While defendant testified that the minor child only stays there when she works, defendant only maintained part-time employment for a short period of time, and plaintiff was able to track where the child was located with the GPS in the child's cell phone. Further, evidence was presented that defendant's apartment was in general disarray; there were large piles of clothing, trash, empty beer boxes and cans, as well as food on the floor. On the other hand, plaintiff owns the home he has lived at since 2008. Accordingly, the evidence does not clearly preponderate against the trial court's determination that factor (d) favored plaintiff.

Factor (e) involves the "permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). This factor is exclusively concerned with whether the family unit will remain intact, and not an evaluation about whether one custodial home would be more acceptable than the other. *Rains v Rains*, 301 Mich App 313, 336; 836 NW2d 709 (2013). The factor focuses on the child's prospects for a stable family environment. *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). The trial court concluded that factor (e) favored plaintiff for the reasons set forth in factors (b), (c), and (d). Defendant argues that because factors (b), (c), and (d), were misapplied, this cannot form the basis in determining this factor. In addition, defendant contends that the record evidence clearly illustrates that she has raised and been the primary caretaker for the minor child since birth, and also that the minor child has two half-brothers and extended family who live nearby.

As discussed above, the trial court did not err in making its determinations under factors (b), (c), and (d); therefore, these same findings can form the basis in determining factor (e). In

addition, although the minor child has two half siblings living in Michigan, the evidence supports a finding that the child has a better prospect for a stable environment with plaintiff. Moreover, evidence was presented that the minor child has a great relationship with plaintiff's other son, whom visits plaintiff in the summer. While plaintiff's other son lives in Michigan, defendant has not facilitated a relationship between plaintiff's son and the minor child. On the basis that plaintiff can provide a more stable environment, and defendant has failed to do so, the trial court's determination that factor (e) favored plaintiff was not against the great weight of the evidence.

Factor (g) involves the "mental and physical health of the parties involved." MCL 722.23(g). The trial court concluded that factor (g) favored plaintiff because testimony was presented that defendant has some mental health concerns and that she drinks alcohol in excess. Defendant argues that, although she has bipolar disorder, no testimony was presented that it affects her parenting abilities. Further, she testified that she rarely drinks alcohol, and never does so in front of her children. The testimony revealed that defendant was diagnosed with bipolar disorder, and was taking medication at the time of the referee hearing. Further, testimony was presented that defendant drinks alcohol in excess, and beer boxes and cans were seen by plaintiff in her apartment. Plaintiff also introduced as an exhibit defendant's Facebook posts wherein she stated that she drank until she vomited and was also playing a "drinking game" called "beer pong." Moreover, plaintiff testified that he had no mental health issues and will only occasionally have a glass of wine with dinner. Despite defendant's contention regarding her mental and physical health, the trial court's finding that factor (g) favored plaintiff is not against the great weight of the evidence.

Factor (k) involves "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). The trial court found that factor (k) favored neither party. Defendant argues that the trial court erred in failing to consider evidence presented that plaintiff was arrested for domestic violence in December 2012. Although evidence was presented that plaintiff was arrested for dating violence, testimony was also presented that it was plaintiff who was actually assaulted by the woman he previously dated, and that plaintiff subsequently filed a restraining order and was cleared of all charges. Because this Court defers to the trial court's determination of credibility, *Shann*, 293 Mich App at 305, and the evidence does not clearly preponderate against the finding that the factor favored neither party, the trial court's determination under factor (k) is not against the great weight of the evidence See *Mitchell*, 296 Mich App at 519.

Defendant lastly contends that the trial court erred with respect to its findings under the factors listed in MCL 722.31(4). We disagree.

"This Court reviews a trial court's decision regarding a motion for change of domicile for an abuse of discretion and a trial court's findings regarding the factors set forth in MCL 722.31(4) under the 'great weight of the evidence' standard." *Rains*, 301 Mich App at 324. An abuse of discretion "is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias." *Brown v Loveman*, 260 Mich App 576, 600-601; 680 NW2d 432 (2004); see also *Fletcher*, 447 Mich at 879-881. This Court may disturb the trial court's findings of fact only if the facts clearly

preponderate in the opposite direction. *McKimmy v Melling*, 291 Mich App 577, 581; 805 NW2d 615 (2011).

Generally, a motion for a change of domicile requires a four-step approach. *Rains*, 301 Mich App at 325. First, the trial court must determine whether the moving party has established, by a preponderance of the evidence, that the factors listed in MCL 722.31(4), support a motion for a change of domicile. *Id.* Second, if the change of domicile is supported by the MCL 722.31(4) factors, the trial court must determine whether an established custodial environment exists. *Id.* Third, if the trial court concludes that an established custodial environment exists, it must determine if the change of domicile would modify or alter the child's established custodial environment. *Id.* Fourth, if the change of domicile would modify or alter the child's established custodial environment, the trial court must determine whether the change of domicile would be in the child's best interest by considering whether the best interests factors listed in MCL 722.23 have been established by clear and convincing evidence. *Id.*

Defendant only challenges the trial court's determination that the change in domicile is supported by the factors delineated under MCL 722.31(4). Under MCL 722.31(1), a parent of child whose custody is governed by a court order must request the permission of the court to change the residence of a child more than 100 miles from the child's residence at the time the order governing custody is issued. *Rains*, 301 Mich App at 326, citing MCL 722.31(1). The trial court must consider the five factors listed in MCL 722.31(4) to determine whether a change of domicile is warranted, with the child as the primary focus of the analysis. MCL 722.31(4). The moving party bears the burden of establishing by a preponderance of the evidence that the change of domicile is warranted. *Rains*, 301 Mich App at 326-327. The MCL 722.31(4) factors are:

> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by the parent's desire to defeat or frustrate the parenting time schedule.
>
> (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
>
> (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
>
> (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. [MCL 722.31(4).]

Defendant argues that the trial court erred in failing to find under MCL 722.31(4)(b) that plaintiff did not utilized all of his parenting time under the court order. The testimony reveals that plaintiff exercised his parenting time during the minor child's holiday breaks and throughout the summer. Further, plaintiff has remained in close contact with the minor child over the telephone. Although plaintiff has not exercised parenting time on Father's Day, he has generally complied with the court order, especially in light of his residency in Florida. Accordingly, the trial court's determination under MCL 722.31(4)(b) is not against the great weight of the evidence.

Defendant also argues that the trial court failed to take into consideration plaintiff's arrest for domestic violence under MCL 722.31(4)(e). As discussed above, although evidence was presented that plaintiff was arrested for dating violence, plaintiff also testified that he was the victim of the assault, he subsequently filed a restraining order against the other party, and was cleared of the charges by the state of Florida. Because this Court defers to the trial court for credibility determinations, the trial court's determination that there was no evidence of domestic violence is not against the great weight of the evidence.

In summary, the trial court did not err in granting plaintiff's motion to modify custody, parenting time and support, and to change the domicile of the minor child.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Amy Ronayne Krause